IN THE DAVIDSON COUNTY CHANCERY COURT,
IN NASHVILLE, TENNESSEE

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien	)	
Petitioners	)	No. 04-1934-I
v.	)	
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions	)	
Respondent	)	

BRIEF IN SUPPORT OF PETITIONERS' MOTION FOR REHEARING AND MODIFICATION OF THE COURT'S ORDER OF AUGUST 9, 2004, FOR OTHER RELIEF, AND FOR EXPEDITED HEARING ON SUCH MOTION

The rationale of the motion is set out in the motion itself—that the Court paid no heed to, and did not even pretend to follow, the law of statutory construction as the only body of law governing the construing of statutes. This brief is written to summarize some canons of statutory construction

which, if heeded, make impossible the assumption (presented as a conclusion) for which the Attorney-General contended, and whose contentions the Court adopted.

Some of the main rules of statutory construction were recently re-stated by the Supreme Court in *Wilkins v. The Kellogg Company,* 48 S.W.3d 148 (Tenn., 2001), which included the following comments:

"[The] premise [that a statute be construed favorably to employees doesn't warrant a court's 'amendment, alteration or extension of its provisions beyond its obvious meaning'] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it.**" (48 S.W.3d at 152; emphasis added). This prohibits judicial amendment of a statute by changing "bank" to mean "bank or trust company," and equally prohibits drawing legislative intent from other than the body of the statute, absent clear ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to **state banks** furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word "bank" as including "trust company" for some sections but for none other.

"In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the 'legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.' *Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).* 'Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.' Id." *(Ibid.,* emphasis added). So when the Legislature says the Commissioner's powers over **trust companies** should include the one specified power of examination **for a limited and defined 3-year period,** it is rationally impermissible to conclude that this expresses a grant not only of the examining power, but of **all other** banking-related powers to be freely exercised over trust

companies.

It was because of the obvious sheer senselessness of the grant of such powers with relation to trust companies when they **must** be granted over banks that Petitioners' counsel thought it needful to give an Economics-101 summary of the nature of the banking business, as known to everyone, perhaps without the ideas being tied together.

The only discernable difference between an assumption (which may be untrue) and a conclusion is that the conclusion is demonstrated to be accurate by rationale proving it accurate, as shown by the facetious definition of statistics as "the art of drawing a mathematically precise line from an unwarranted assumption to a foregone conclusion." There is no presumption that statutes granting destructive powers to state officials should be construed in favor of extending those powers, but the presumption is to the contrary. The commissioner's pretended conclusions are merely assumptions, and false ones at that.

The motion asked the Court to notice its entire file, including affidavits not only supporting *certiorari* and *supersedeas*, but also the *mandamus* affidavits. These prove that while the computer records show "accounts receivable"—moneys due Sentinel for the benefit of bond issuers—to total over $7 million, these include large compounded penalties for the overdrafts by defaulted bond issuers, so that the actual balance of borrowing from cash was "$3,167,678," (Bates *mandamus* affidavit) as of the end of March, 2004, with Sentinel entitled to over $2,600,000 in earned fees mostly covering this deficiency, with much more money to come in from collection efforts against defaulted bond issuers, and with Sentinel recognizing its responsibility for any remaining deficiency at the end of liquidation not of its assets but of the assets of defaulted bond-issuers. The insolvency assumed by the Commissioner is wholly fictitious, because Sentinel has never failed to meet any obligation when due from the funds it holds in trust, nor has it been shown to ever meet any of its own obligations from its own funds when due. It is indisputable that the Commissioner's usurpation of the seizure and liquidating powers have caused bond defaults that otherwise would never have occurred.

When a public official exercises powers not granted to him by statute, the constitutionally-guaranteed *certiorari* is not limited in evidence to those facts the official has elected to make of record in compiling the *ex parte* documentation to seek to justify his use of power. But when the statute on its face doesn't even **purport** by words to grant the official the destructive power he has used, the facts alleged in the *certiorari* petition are true unless denied in a responsive pleading. The Supreme Court so held long ago in remanding for trial to determine if the facts set out in a contested *certiorari* petition were true, *Spears v. Loague, County Clerk*, 46 Tenn. 420, 423 (1869). This is one of a series of early cases when the county clerks were authorized to determine for themselves, without adversarial trial before any judge, that a citizen was exercising a taxable privilege, then on his own authority issue a distraint warrant and cause the citizen's property to be sold.

This is the situation here, in which the official makes, proclaims, and enforces his own determination, and under the bank-seizure laws, contrary to this Court's assumption, the Commissioner does not "choose" to file anything in the local chancery court. He is absolutely required to file copies of some of his determinations in the Clerk & Master's office, then **after he has made decisions,** to seek that chancellor's approval before effectuating his own decisions. As to some of these approvals, he is permitted to obtain them *ex parte* for sale of some or all of a state bank's assets to preferred purchasers, T.C.A. § 45-2-1502(c)(3). The statute does not require the commencement of **any litigation** in the Lewis County Chancery Court, but only a series of discrete approvals. In fact, no process has been issued or prayed against any respondent, nor does the statute for the seizure of banks require any. Litigation may be commenced only by the issuance of a writ, and every litigation-commencing writ (summons and subpoena to answer as well as the latin-named writs) constitutionally must be issued in the name of the State of Tennessee, not some city or commissioner, to be legally valid, *Mayor and Aldermen v. Pearl*, 30 Tenn. 249 (1850).

Of course, in modern times, new limited rights have been created, such as public employment rights under civil service and other such limited laws, where a widely limited powers occur under different statutes, so that an administrative record is essential to the limited review rights. But this

case involves the right of a corporation to exist and be controlled by its owners, which is a fundamental right not terminable upon the mere pleasure of the Commissioner or of any other public official. This usurpation of destructive power cries out for the use of judicial power to prevent its consummation while time remains.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing brief has been mailed this August 13, 2004, postage prepaid, to the following:

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